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No. 07-

IN THE

Supreme Court of the United States

MARIO ALFREDO SALINAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the decision below, the court of appeals recognized a split among the circuits on the following question:

Whether a defendant's silence before he has received the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), is protected by the Fifth Amendment's privilege against self-incrimination such that his silence cannot be used as substantive evidence of guilt.

PARTIES TO THE PROCEEDING

Petitioner is Mario Alfredo Salinas, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Alfredo Salinas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The court of appeals' decision is reported at 480 F.3d 750 and is reprinted in the Appendix to the Petition ("App.") at 1a-15a.

JURISDICTION

The court of appeals issued its decision on March 5, 2007. App. 1a. A timely petition for rehearing was denied on April 9, 2007. App. 16a-17a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, *inter alia*, that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The full text of the Fifth Amendment is reproduced at App. 18a.

STATEMENT OF THE CASE

Petitioner was charged with a single count of being a felon in possession of two firearms in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). ROA 88-89.[1] His defense at trial was that he did not know that there were two guns hidden in the borrowed vehicle he was driving when he was arrested for driving without insurance. The government began its opening argument by stating that petitioner never denied ownership of the guns. The government then continuously elicited testimony during the direct examination of its first

[1] Citations to "ROA" herein refer to the Record on Appeal filed with the lower court in this case. Citations to "Tr." refer to the trial transcript.

witness, the arresting officer, regarding petitioner's silence and used this silence as substantive evidence of guilt.

The Fifth Circuit has previously held that prosecutorial comment on a defendant's silence is impermissible even in the absence of the police informing a defendant of his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). Nevertheless, the panel in this case affirmed petitioner's conviction. Although it ignored its own precedent, the court of appeals described the deep circuit split on this issue, acknowledging that at least three other circuits have held that substantive use of post-arrest, pre-*Miranda* silence is impermissible under the Fifth Amendment (with some circuits similarly forbidding the use of pre-arrest, pre-*Miranda* silence), while three circuits have allowed such evidence. App. 12a. Review by this Court is warranted.

A. Constitutional Background

The Fifth Amendment prevents a defendant from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court consistently has given effect to this protection by carefully circumscribing the extent to which the government may substantively use a defendant's silence.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), when faced with the question whether the prosecution may point to a defendant's failure to testify at trial, the Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." The Court subsequently broadened this principle to include pre-trial silence, observing in *Miranda* that because "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege," "[t]he prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37.

Nothing in this Court's Fifth Amendment case law suggests any distinction, for these purposes, between a defendant who invokes his right to silence after he receives his *Miranda* warnings and one who invokes before the warnings are given. Nevertheless, as discussed below, the federal courts of appeals are badly divided on the question whether a defendant's pre-*Miranda* silence may be used against him as substantive evidence of guilt, consistent with the Fifth Amendment.[2]

B. Factual And Procedural Background

1.a. While driving a GMC Yukon on the night of April 9, 2003, petitioner was pulled over by Officer Fulcher, of the Carrollton Police Department, for having a defective tail light. Tr. Vol. 2:210. Officer Fulcher asked petitioner for his driver's license and proof of insurance. Tr. Vol. 2:212. Petitioner provided his license but stated that he did not have proof of insurance because he was in the process of buying the vehicle. Tr. Vol. 2:213. Officer Fulcher then ran a warrant check, which revealed that petitioner's driver's license was valid, but nevertheless arrested petitioner for driving without insurance. Tr. Vol. 2:214-15. At no point,

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[2] It is important to distinguish the Fifth Amendment question presented by this case from the Due Process issue addressed in cases like *Doyle v. Ohio*, 426 U.S. 610 (1976). In *Doyle*, this Court held that the Due Process Clause prohibits use of a defendant's silence after *Miranda* warnings are given even for the limited purpose of impeachment, on the theory that the *Miranda* warnings carry an implicit promise that *no* use will be made of a defendant's silence. *Id.* at 619; *cf. Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (holding that there is no due process violation when a state permits cross-examination as to post-arrest, pre-*Miranda* silence when a defendant chooses to take the stand). *Doyle*'s emphasis on the giving of *Miranda* warnings is relevant only under a Due Process analysis; it has no bearing at all on the question of whether the Fifth Amendment is violated by use of a defendant's silence as substantive evidence of guilt.

even after the formal arrest, did Officer Fulcher read petitioner his *Miranda* rights. Tr. Vol. 2:229.

After petitioner's arrest, Special Agent Iber of the Bureau of Alcohol, Tobacco, Firearms, and Explosives and Agent Fountain of the Drug Enforcement Agency, both employed by the Carrollton Police Department on the date of petitioner's arrest, conducted an inventory search of the vehicle. Tr. Vol. 2:238, 265. Special Agent Iber testified at trial that he found, among other things, a brown paper sack containing $3,397.00 in cash between the driver's seat and the center console and a black leather case containing a Rossi .357 Magnum revolver underneath the front passenger seat. Tr. Vol. 2:240-41. Special Agent Iber testified that the only thing he saw between the driver's seat and the console was the brown paper sack and that the Rossi under the passenger seat was not plainly visible. Tr. Vol. 2:249-50. Agent Fountain testified that he found a Ruger handgun located between the driver's seat and the center console. Tr. Vol. 2:266-67. He also testified that he could only see the Ruger, which was located six to seven inches down from the top of the center console, with his flashlight. Tr. Vol. 2:266-67. Petitioner was ultimately charged with one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). ROA 88-89.

b. Petitioner's defense at trial was that he did not know the guns were hidden in the vehicle, which he had borrowed from his brother-in-law, Rosendo Moreno. Moreno testified that he bought the Rossi handgun found in the Yukon in March 2003 and that he bought the Ruger found in the vehicle from Carlos Hernandez at the end of March or in early April 2003. Tr. Vol. 3:95-96. Although Moreno did not have any documentation that he was the owner of either gun, Tr. Vol. 3:111-13, Hernandez testified that Moreno purchased the Ruger from him toward the end of March 2003. Tr. Vol. 3:140. At the time of petitioner's arrest,

Moreno confirmed that he owned both of the guns. Tr. Vol. 3:112-13.

Moreno stated that he purchased the Yukon on April 8, 2003 and drove it to a firing range later that day. Tr. Vol. 3:104, 113-14. He further testified that, after he finished target practice, he re-loaded the Ruger and the Rossi and stashed them in the Yukon—placing the Ruger between the driver's seat and the console and the Rossi in a black zipper bag between the passenger seat and the passenger seat console. Tr. Vol. 3:97, 116. After his trip to the firing range, Moreno took the vehicle to Big Rig Detailers, where petitioner worked, for some repairs. Tr. Vol. 3:91. Moreno stated that he had brought cash for the repairs, had taken out about $3,300.00 from his bank account, and had placed the money in a brown paper sack between the driver's seat and center console on top of the Ruger. Tr. Vol. 3:91-92, 98. While Moreno was at Big Rig Detailers, petitioner approached him and asked if he could borrow the Yukon because his car was in the shop. Tr. Vol. 3:92, 150-51. Moreno agreed. Tr. Vol. 3:92, 150-51. This conversation was witnessed by Christopher Cruz, the owner of Big Rig Detailers. Tr. Vol. 3:150. Moreno testified that when he heard that petitioner had been charged with possession of the two loaded weapons found in the vehicle, he "felt guilty. I mean, it was my fault." Tr. Vol. 3:93.

c. At trial, the government's case against petitioner relied heavily on petitioner's failure, after he was arrested and in the absence of any *Miranda* warnings, to offer any exculpatory account of the presence of weapons in the car. Specifically, the government used petitioner's silence during its opening argument and repeatedly elicited testimony about that silence during its case-in-chief. First, during opening arguments, the government stated:

> While the defendant was in custody and while the defendant was in the presence of Officer Fulcher

> back at Carrollton PD, the evidence is going to show that an officer by the name of Pace radioed to Fulcher telling Fulcher that Pace and others had found the two loaded weapons and had found the money in the brown paper bag in the vehicle.
>
> *At no time, at no time, the evidence is going to show, that the defendant denied ownership of the guns.*

Tr. Vol. 2:202 (emphasis added). Defense counsel objected to this line of argument to the extent "it gets into any kind of silence after arrest," Tr. Vol. 2:203, and the trial court sustained the objection.

Then, despite the court's previous ruling, the government questioned its first witness, Officer Fulcher, about the fact that another officer told him over the radio that two guns had been found in the vehicle. Tr. Vol. 2:218-19. When defense counsel objected, the government stated that it was offering this evidence "for the effect it had on the listener. . . . I'm going to ask the witness whether or not defendant heard that statement as well." Tr. Vol. 2:219. The court overruled this objection, instructed the jury that it could consider the testimony "for the limited purpose only of the impact it had on those people who heard the statement made," and allowed the government to proceed. Tr. Vol. 2:219-20.

The government continued its efforts to elicit testimony from Officer Fulcher regarding petitioner's silence. First, the government asked if petitioner was "close enough to have heard what Officer Pace relayed to" Officer Fulcher about the two guns found in the Yukon. Tr. Vol. 2:221. When Officer Fulcher answered that petitioner was close enough to have heard, the government next asked whether Officer Fulcher "recall[ed] how, if at all, the defendant reacted to the statement by Officer Pace." Tr. Vol. 2:221. Defense counsel's objection to this line of questioning was sustained. Undeterred, the prosecutor then asked a final

question: "Officer Fulcher, after the defendant's arrest, *at any time did he make any statements to you?*" Tr. Vol. 2:222 (emphasis added). The officer replied, "*No, sir*," Tr. Vol. 2:222 (emphasis added), before defense counsel had the opportunity to object. Defense counsel did object after Officer Fulcher answered the government's question. Tr. Vol. 2:222-23. The court sustained the objection and stated that it would consider whether to instruct the jury to disregard the testimony at a later time. Tr. Vol. 2:223 ("I'm not going to instruct at this time. I'll consider that later.").[3] Petitioner was ultimately convicted.

2. The Fifth Circuit (Garwood, Dennis, Owen) affirmed. The panel recognized that "there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." App. 12a. The court of appeals proceeded to describe the split, observing that "[t]he Seventh, Ninth, and D.C. Circuits have all squarely held that it does," that "[t]he First and Sixth Circuits have gone further and have held that the substantive use of even pre-arrest silence can violate the privilege,"[4] and that "[t]he Fourth, Eighth, and Eleventh Circuits have, on the other hand, found the substantive use of post-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief permissible." App. 12a.

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[3] Despite this assurance, the trial court did not reconsider a jury instruction regarding Officer Fulcher's testimony before submitting the matter to the jury. Regardless, a jury instruction could not have cured the prejudice caused by the officer's testimony regarding petitioner's silence. *See* Section II, *infra*.

[4] As discussed below, the Tenth Circuit has also held that prosecutorial reference to a defendant's pre-arrest silence during its case-in-chief violates the Fifth Amendment, *see United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), but that decision was not discussed by the lower court.

The panel, however, attempted to avoid deciding the constitutional question by stating that "[b]ecause this circuit's law remains unsettled and the other federal circuits have reached divergent conclusions on this issue, even assuming that the prosecutor's comments were improper, Salinas cannot satisfy the second prong of the plain error test–that the error be clear under existing law." App. 13a. In so holding, the panel did not even mention the Fifth Circuit's controlling precedent on this issue, *United States v. Impson*, 531 F.2d 274, 279 (5th Cir. 1976), which held that the government's reference to a defendant's post-arrest, pre-*Miranda* silence during its case-in-chief was impermissible and "intolerably prejudicial" and thus aligned the Fifth Circuit with those circuits that have refused to allow substantive government use at trial of a defendant's post-arrest, pre-*Miranda* silence.

REASONS FOR GRANTING THE PETITION

As expressly recognized by the Fifth Circuit below, App. 12a, the circuits are deeply divided over whether substantive use of a defendant's pre-*Miranda* silence violates the Fifth Amendment privilege against self-incrimination. In the post-arrest context, the Seventh, Ninth and D.C. Circuits have all held that it does, while the First, Sixth and Tenth Circuits have reached the same conclusion in the context of comments on pre-arrest silence. The Fourth, Eighth and Eleventh Circuits (effectively joined by the panel in this case), on the other hand, have held that substantive use of pre-*Miranda* silence is permissible. The states that have addressed the issue are also divided. This Court's review is warranted to resolve the circuit split and clarify the confusion among the lower courts regarding the contours of this Court's Fifth Amendment jurisprudence.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE GOVERNMENT MAY USE A DEFENDANT'S PRE-*MIRANDA* SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT.

A. The Seventh, Ninth and D.C. Circuits Have Properly Held That The Fifth Amendment Prevents the Government From Using Post-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

Three circuits have squarely and correctly held that substantive use of a defendant's post-arrest, pre-*Miranda* silence impermissibly burdens the defendant's Fifth Amendment privilege against self-incrimination. App. 12a.

In *United States v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001), the Ninth Circuit sitting en banc reaffirmed its prior decisions holding that the admission of evidence of a defendant's post-arrest, pre-*Miranda* silence violates the privilege. *Id.* at 1029-30 (reaffirming *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000)). In that case, the government elicited direct testimony from a customs agent regarding the defendant's non-responsiveness during an interview that took place following the agent's discovery of marijuana in the defendant's car but before he was read his *Miranda* rights. *Id.* at 1027. The Ninth Circuit reversed the conviction. Its holding was grounded in the basic principle that "the right to remain silent carries an 'implicit assurance' that silence will carry no penalty." *Id.* at 1028 (quoting *Doyle*, 426 U.S. at 618). The Ninth Circuit also reiterated its position that, in the post-arrest context, "regardless of whether the [*Miranda*] warnings are given, absent waiver, comment on the defendant's exercise of his right to silence violates the Fifth Amendment" because "the right to remain silent derives from the Constitution and not from the *Miranda* warnings themselves." *Id.* at 1029.

The D.C. Circuit had previously reached the same conclusion in *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), holding, based on this Court's decisions in *Griffin* and *Miranda*, that prosecutorial reliance on a defendant's silence after he was taken into custody was impermissible: "The silence of an arrested defendant, under *Griffin*, is an exercise of his Fifth Amendment rights which the Government cannot use to his prejudice." *Moore*, 104 F.3d at 387. Like the Ninth Circuit, the D.C. Circuit firmly stated that the fact that the defendant had not yet received his *Miranda* warnings was of no moment, observing that "[t]o hold . . . that the failure to give those . . . warnings permits the state to use a defendant's silence against him turns a whole realm of constitutional protection on its head." *Id.* at 386.

Similarly, the Seventh Circuit held that a defendant's Fifth Amendment rights were violated when a prosecutor "deliberately elicited" a reference to the defendant's post-arrest, pre-*Miranda* silence on direct examination of the arresting officer. *United States v. Hernandez*, 948 F.2d 316, 322, 324 (7th Cir. 1991) (reiterating prior precedent holding that "'it is a violation of the Fifth Amendment privilege against self-incrimination to allow a prosecutor to use as evidence of guilt a defendant's refusal to talk to the police'") (quoting *United States v. Ramos*, 932 F.2d 611, 616 (7th Cir. 1991)).

Until this case, precedent in the Fifth Circuit was squarely aligned with that of the other circuits holding that substantive use of a defendant's post-arrest, pre-*Miranda* silence by the government is impermissible. *See United States v. Impson*, 531 F.2d 274, 277-79 (5th Cir. 1976) (holding that prosecutorial reference to defendant's silence during the government's case "carried with it an intolerably prejudicial impact"); *see also United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978) (observing that it

"appear[ed] that the defendant's constitutional rights were violated by the prosecutor's comments on his silence at arrest" during closing argument).

B. The First, Sixth and Tenth Circuits Have Properly Held That The Fifth Amendment Prevents The Government From Using Pre-Arrest, Pre-*Miranda* Silence As Substantive Evidence Of Guilt.

The lower court correctly observed that some circuits have likewise held that the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *See* App. 12a. In fact, three circuits have squarely and correctly reached this conclusion.[5] *See Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (holding that Fifth Amendment applies in pre-arrest setting and "that the use of a defendant's prearrest silence as substantive evidence of guilt violates the . . . privilege against self-incrimination"); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) (relying on *Griffin*'s "general rule . . . that once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which defendant exercised" to hold that the government's substantive use of defendant's pre-arrest silence was plain error); *Coppola v.*

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[5] As the court of appeals noted, App. 12a, when faced with the question whether a defendant's right against self-incrimination was violated when the prosecution elicited testimony regarding the defendant's failure to protest when his suitcase was searched for counterfeit money, the Second Circuit also expressed doubt that evidence of pre-arrest silence can be used in the government's case-in-chief. *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981). The Second Circuit in that case "assume[d], without deciding, that even if [it held] that [the defendant] was not in custody . . . this would not necessarily carry the day for the prosecution in light of the fact that all of the cases permitting proof of silence . . . have involved impeachment or rebuttal of the defendant's testimony." *Id.*

Powell, 878 F.2d 1562, 1567-69 (1st Cir. 1989) ("We have found no cases by the United States Supreme Court holding or suggesting that a prearrest statement by a suspect during police interrogation that he is not going to confess can be used by the prosecutor in his case in chief.").

Logic dictates that these circuits also would not allow the substantive use of post-arrest, pre-*Miranda* silence. Indeed, the Seventh Circuit, which has disallowed the use of pre-arrest silence, *see United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987), has also disallowed the use of post-arrest, pre-*Miranda* silence, as discussed above. *See Hernandez*, 948 F.2d at 322. The Tenth Circuit has also indicated that its prohibition on the use of pre-arrest silence would apply equally to post-arrest silence. *See United States v. Lauder*, 409 F.3d 1254, 1261 (10th Cir. 2005).

C. The Fourth, Fifth, Eighth And Eleventh Circuits Have Allowed The Substantive Use Of Post-Arrest, Pre-*Miranda* Silence.

In square conflict with the cases discussed above, four circuits, including the Fifth Circuit in this case, have held that the government may use a defendant's pre-*Miranda* silence as substantive evidence of guilt. App. 12a.

In *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005), the Eighth Circuit held that substantive governmental use of the defendant's pre-*Miranda* silence does not violate the Fifth Amendment. It recognized the circuit split on this question but rejected the holdings of the Seventh, Ninth and D.C. Circuits, *id.* at 1110-11, reasoning that the Fifth Amendment privilege is "'irrelevant'" when an individual "'is under no official compulsion to speak'" and that the use of pre-*Miranda* silence is therefore permissible because such silence is not induced by any governmental action. *Id.* (quoting *Jenkins v. Anderson*, 447 U.S. 213, 241 (1980) (Stevens, J., concurring)).

Other circuits have also permitted governmental use of pre-*Miranda* silence. *See United States v. Rivera*, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991) (stating that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings" and noting that the key question was "not when [the defendant] was arrested or technically in custody, but when she was given her *Miranda* warnings"); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985) (holding that direct testimony of agents regarding defendants' post-arrest silence was properly admitted because the silence occurred before defendants had been given the *Miranda* warnings).

Although it claimed not to decide the issue, the panel below completely ignored the Fifth Circuit's decision in *Impson*, discussed above, and affirmed petitioner's conviction despite the government's use of his pre-*Miranda* silence as substantive evidence of guilt. App. 12a-13a. In doing so, the Fifth Circuit completed the reversal of course it began with its decision in *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (holding that, in certain circumstances, prosecutorial reference to pre-arrest silence did not violate the Fifth Amendment), and aligned itself with the circuits allowing substantive use of such silence.

D. State Courts Are Also Divided On The Use Of Pre-*Miranda* Silence.

The states that have considered the issue are similarly split. Courts in Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington and Wisconsin have forbidden substantive prosecutorial use of a defendant's pre-*Miranda* silence. Courts in Arizona, Connecticut, New Hampshire and North Carolina have reached the opposite conclusion. *Compare Dorman v. State*,

622 P.2d 448 (Alaska 1981); *People v. Sasser*, No. B148168, 2002 WL 259949 (Cal. Ct. App. Feb. 25, 2002); *People v. Quintana*, 665 P.2d 605 (Colo. 1983) (en banc); *State v. Hoggins*, 718 So. 2d 761 (Fla. 1998); *Mallory v. State*, 261 Ga. 625, 409 S.E.2d 839 (1991); *State v. Lopez*, 141 Idaho 575, 114 P.3d 133 (Idaho Ct. App. 2005); *People v. Strong*, 215 Ill. App. 3d 484, 574 N.E.2d 1271 (1991); *Kosh v. State*, 382 Md. 218, 854 A.2d 1259 (2004); *Commonwealth v. Andujar*, 57 Mass. App. Ct. 529, 784 N.E.2d 646 (2003); *State v. Rogers*, No. A04-378, 2004 WL 2939667 (Minn. Ct. App. Dec. 21, 2004); *State v. Graves*, 27 S.W.3d 806 (Mo. App. W.D. 2000); *State v. Rowland*, 243 Neb. 872, 452 N.W.2d 758 (1990); *Morris v. State*, 112 Nev. 260, 913 P.2d 1264 (1996); *State v. Muhammad*, 182 N.J. 551, 868 A.2d 302 (2005); *People v. Conyers*, 52 N.Y.2d 454, 420 N.E.2d 933 (1981); *State v. Combs*, 62 Ohio St. 3d 278, 581 N.E.2d 1071 (1991); *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982); *Wyborny v. State*, 209 S.W.3d 285 (Tex. Ct. App. 2006); *State v. Davis*, 686 P.2d 1143 (Wash. 1984); *State v. Lanoi*, 570 N.W.2d 911 (Wis. Ct. App. 1987) *with State v. Ramirez*, 178 Ariz. 116, 871 P.2d 237 (1994); *State v. Kuranko*, 71 Conn. App. 703, 803 A.2d 383 (2002); *State v. Hill*, 146 N.H. 568, 781 A.2d 979 (2001); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986).

* * *

In sum, three circuits (D.C., the Seventh and the Ninth) properly hold the Fifth Amendment is violated when the government points to a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt. Until its decision in this case, controlling precedent in the Fifth Circuit was aligned with these circuits. Three more circuits (the First, Sixth and Tenth) have reached the same conclusion with respect to pre-arrest, pre-*Miranda* silence. In direct and express conflict with those decisions, three other circuits (the Fourth, Eighth and Eleventh) hold that this practice is

permissible. Similar disarray marks state case law. The question presented is ripe for this Court's review.

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

This case is a proper vehicle to resolve the well-developed circuit split on the question presented here. Although the Fifth Circuit avoided expressly deciding this issue in this case on the ground that any error during the trial was not plain, App. 13a, that rationale is patently incorrect and thus presents no impediment to this Court's review.

According to the court of appeals, even assuming the prosecutor's comments were improper, petitioner could not establish that the error was clear under existing law because the circuit's own law "remain[ed] unsettled and the other federal circuits have reached divergent conclusions on this issue." App. 13a. The reality is precisely the opposite—the Fifth Circuit already has squarely decided that prosecutorial comment at trial on a defendant's post-arrest, pre-*Miranda* silence is impermissible. *See Impson*, 531 F.2d at 279. In *Impson*, the prosecutor elicited testimony regarding the defendant's post-arrest, pre-*Miranda* silence during his direct examination of the arresting officer. The court of appeals held that this testimony "carried with it an intolerably prejudicial impact." *Id.* In the process, it flatly rejected the same argument the government made in this case: that the mention of the defendant's silence was permissible simply because the testimony referred to events that occurred before the defendant had been read the *Miranda* warnings. *Id.* at 277-78 ("We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt than silence following such warnings.").

Although the facts of this case are virtually identical to those in *Impson*, the court of appeals did not even mention that decision here. But, *Impson* is controlling precedent and makes clear both that the law on this issue in the Fifth

Circuit was settled at the time of petitioner's trial and that allowing such testimony is "intolerably prejudicial." *Id.* at 279. Because of this "intolerable prejudice," no jury instruction could have cured the unacceptable situation created by the prosecutor's use of petitioner's silence as evidence of guilt, both during his opening argument and during his repeated questioning of Officer Fulcher on this subject.[6] As the Fifth Circuit unequivocally stated in a case similar to *Impson*: "[T]he comment upon the silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete." *Edwards*, 576 F.2d at 1155. There is no question but that the error in this case was plain.[7]

The Fifth Circuit's position as articulated in *Impson* is precisely aligned with that of the three circuits that have held that substantive use of post-arrest, pre-*Miranda* silence during the prosecutor's case-in-chief violates the Fifth Amendment privilege against self-incrimination. That question is squarely presented here, despite the court of appeals' effort to avoid it, and this Court should grant review

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[6] As noted earlier, in ruling on defense counsel's objection to Officer Fulcher's testimony that petitioner did not make any statements after his arrest, the trial court stated that it would consider a curative jury instruction later in the case. Tr. Vol. 2:223. However, the court never reconsidered this issue.

[7] The fact that the views of other circuits diverge on this issue does not alter this conclusion. The notion that an error cannot be plain when a circuit split on the issue exists comes into play *only* if there is no controlling precedent from this Court or the relevant court of appeals. *See, e.g.*, *United States v. Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006) (holding that circuit split precluded a finding of plain error when "neither the Supreme Court nor the Tenth Circuit ha[d] ruled on the issue"); *United States v. Williams*, 53 F.3d 769, 772 (6th Cir. 1995) (when issue was one of first impression in the circuit, "circuit split preclude[d] a finding of plain error").

to resolve the circuit split and provide clarity in this important area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 2007

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mario Alfredo SALINAS,
Defendant-Appellant.

No. 05-10964.

United States Court of Appeals,
Fifth Circuit.

March 5, 2007.

Renee Harris Toliver, Fort Worth, TX, Susan B. Cowger, Chad Eugene Meacham, Dallas, TX, for Plaintiff-Appellee.

Jason Douglas Hawkins, Dallas, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD, DENNIS and OWEN, Circuit Judges.

DENNIS, Circuit Judge:

This case is before us on appeal of defendant Mario Alfredo Salinas's conviction for unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). For the reasons stated below, we AFFIRM Salinas's conviction.

I. Background and Proceedings Below

At approximately 11:15 p.m. on April 9, 2003, defendant Mario Alfredo Salinas was driving a black, 1999 GMC Yukon. Officer Erwin Fulcher of the Carrollton, Texas, police department stopped the vehicle because it had a defective tail light. Officer Fulcher asked Salinas for his license and proof of insurance. Salinas gave the officer his driver's license, but stated that he did not have proof of insurance because he was in the process of purchasing the vehicle. Officer Fulcher eventually arrested Salinas for failure to provide proof of insurance and transported Salinas to the Carrollton police station.

After Salinas was arrested, additional Carrollton police officers on the scene conducted an inventory search of the Yukon. During the search, officers found a brown paper bag, which contained $3,397 in cash, between the driver's seat and the center console. Beneath the bag, officers found a loaded Ruger 9mm semiautomatic pistol. Officers also found a black pouch containing a loaded Rossi .357 Magnum revolver under the front passenger seat. The Yukon's rear cargo area contained a gym bag with $168 and some vitamins inside it. At the police station, officers found $2,168 in cash in Salinas's jacket pocket.

Two days after his arrest, Salinas returned to the Carrollton police station and said that he wished to pick up his "money and other stuff." The property room officer stated that all of the seized property was evidence and could

not be released to Salinas. The officer also stated that, because Salinas was a convicted felon, the firearms could not be returned to him. Salinas responded, "I know that," and he then left.

Salinas ultimately was charged with one count of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). At trial, Salinas's defense was that he had borrowed the Yukon from his friend Rosendo Moreno, and that he did not know that the firearms were in the car. Moreno testified at trial that he purchased the Yukon on April 8, 2003, from a man named Henry Lopez. Moreno stated that, on April 9, 2003, he took the vehicle to Big Rig Detailers, an automotive shop at which Salinas worked, to have some hail damage repaired and to have the car painted. While he was there, Moreno stated, Salinas told Moreno that his car was in the shop, and he asked Moreno whether he could borrow the Yukon. To support Moreno's testimony, the defense offered into evidence a bill of sale showing a sale from Lopez to Moreno on April 8, 2003. The bill of sale indicated that it had been notarized by Jose Francisco May.

Moreno also testified that the cash and the two firearms found in the Yukon belonged to him. He stated that he purchased the .357 Magnum in a "street buy," and that he purchased the 9mm from a friend named Carlos Hernandez. Moreno testified that the guns were in the Yukon because he had used them at a gun range earlier on April 9, 2003, before he loaned the vehicle to Salinas, and that he kept the firearms loaded because he had previously been the victim of an attempted carjacking.

On cross-examination, Moreno admitted that he did not have a permit for either weapon, that the firearms were not registered to him, and that he did not have any

documentation to prove that he owned the firearms. The prosecution also cross-examined Moreno at some length about other aspects of his version of events, including the fact that, although he claimed that the $3,397 found in the Yukon belonged to him, he had never made any attempt to recover the money from the Carrollton police department.

The defense also presented testimony from Carlos Hernandez, who testified that he sold Moreno the 9mm in March 2003, and from Salinas's employer, Christopher Cruz, who stated that he recalled that Moreno brought a sport utility vehicle to Big Rig Detailers in April 2003, and that Salinas had borrowed the vehicle. Salinas did not testify in his own defense at the trial.

In rebuttal, the prosecution presented testimony from Henry Lopez, the registered owner of the Yukon. Lopez testified that he did not sell the Yukon to Moreno on April 8, 2003. Lopez stated that he sold the Yukon to a friend named Shane Clendening on April 1, 2002, and that he believed that the vehicle had since been resold several times, but that the title had never been transferred out of his name. Lopez also stated that, although he signed a bill of sale that purported to describe a sale to Rosendo Moreno on April 8, 2003, he actually signed the document on April 16, 2003, and he did so only because he believed that it would help to get the title transferred out of his name. Lopez testified that there was not a notary public present when he signed the bill of sale. The government also called Jose Francisco May, the notary public, who testified that he did not notarize the bill of sale between Lopez and Moreno.

On January 20, 2005, a jury convicted Salinas, and on July 11, 2005, the district court sentenced him to 57 months in prison. On appeal, Salinas makes two arguments. First, he argues that the prosecution improperly attempted to use

his post-arrest silence as substantive evidence of his guilt. Second, Salinas claims that the evidence at trial was insufficient to support his conviction.

II. The Prosecution's References to Salinas's Post-Arrest Silence

Salinas claims that the prosecution improperly made reference to his post-arrest silence at three points during its case-in-chief. First, during the prosecution's opening argument, the prosecutor stated, "At no time, at no time, the evidence is going to show, that the defendant denied ownership of the money or guns." Defense counsel immediately objected to that remark. The court sustained the objection and reminded the jury that it was to render its verdict only on the basis of the evidence presented, not on the arguments of counsel.

Second, during the government's examination of Officer Fulcher, who arrested Salinas and who was with Salinas at the Carrollton police station when the firearms were discovered in the Yukon, the prosecutor asked Officer Fulcher "how, if at all" Salinas reacted when he heard that firearms had been found in the Yukon. Defense counsel objected before the witness could answer, and the court sustained the objection.

Third, later in its direct examination of Officer Fulcher, the prosecution asked Officer Fulcher whether Salinas made any statements after his arrest. Officer Fulcher answered, "No, sir." Defense counsel again objected, and the court sustained the objection. Defense counsel also requested that the jury be instructed to disregard the statement. The trial judge stated that he would not then instruct the jury, but would consider an instruction at a later time. Defense counsel apparently never reiterated his request for an

instruction. In its charge to the jury, however, the court instructed the jury that the statements and arguments of the lawyers could not be considered as evidence and that the jury was to disregard any question to which the court had sustained an objection.

Salinas asserts that each of those statements was an improper comment on his post-arrest silence, in violation of his constitutional rights. The government maintains that the comments and questions were permissible. The government points out that Salinas did not receive the *Miranda*[1] warnings at the time of his arrest,[2] and it argues that the prosecution can permissibly refer to a defendant's pre-*Miranda* warning silence at trial.

Because Salinas did not properly preserve his claim of error regarding the prosecutor's comments on his post-arrest silence in the district court, we review this claim only for plain error. Although Salinas's counsel timely objected to each of the prosecutor's references to Salinas's post-arrest silence, the trial court sustained all of those objections, and the trial court's instructions to the jury made it clear that the jury was not to consider any of the challenged remarks.[3]

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Officer Fulcher testified at trial that he did not read Salinas the *Miranda* warnings because he had no intention of interrogating Salinas.

[3] With respect to the comment made during the prosecutor's opening statement, the district court, at Salinas's request, instructed the jury that the lawyers' comments were not evidence. While the trial court declined to immediately instruct the jury to disregard the final improper remark--the court stated that it was "not going to instruct at this time," but would "consider that later"--the district court did later charge the jury that it was to disregard any question to which the court sustained an objection. In addition, nothing in the record indicates that Salinas again raised the issue with the district court or objected to its handling of the situation.

Salinas's counsel never took exception to the district court's handling of his objections, and, significantly, Salinas never requested that the district court declare a mistrial. Thus, Salinas effectively received all of the relief that he requested from the district court. When a defendant asks this court to reverse a conviction under these circumstances, the defendant essentially asks us "'to go against the implicit judgment of both the trial court and the defendant's trial counsel that the trial court's corrective action was adequate and appropriate.'" *United States v. Carter*, 953 F.2d 1449, 1465-66 (5th Cir. 1992) (quoting *United States v. Canales*, 744 F.2d 413, 431 (5th Cir. 1984)). In such cases, we consider the challenged comments under the plain error standard. *See id.* at 1466 (applying plain error standard where trial court sustained defendant's objections and defendant did not request mistrial; stating that "logically there is little difference between a case that comes to us where no objection has been made to the alleged impropriety and one where no further objection has been made to the trial judge's handling of an impropriety"); *see also Canales*, 744 F.2d at 431.

To establish plain error, the defendant must show that "(1) there is an error, (2) the error is clear or obvious, and (3) the error affects his substantial rights." *United States v. Coil*, 442 F.3d 912, 916 (5th Cir. 2006); Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). An error is considered plain, or obvious, only if the error is clear under existing law. *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (stating that a "court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law"). If those three conditions are satisfied, this court may grant relief if "the error seriously affects the fairness, integrity, or public reputation of judicial

proceedings." *United States v. Ibarra-Zelaya*, 465 F.3d 596, 606 (5th Cir. 2006) (citing *United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005)); *United States v. Garcia-Flores*, 246 F.3d 451, 457 (5th Cir. 2001) ("'Plain error occurs when the error is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings and would result in manifest injustice.'") (quoting *United States v. Mizell*, 88 F.3d 288, 297 (5th Cir. 1996)).

A prosecutor's invocation of the defendant's exercise of the right to remain silent can potentially implicate two, distinct constitutional rights-- due process, and the Fifth Amendment privilege against self-incrimination. We consider each in turn.

A. Due Process

In a series of cases, the Supreme Court has established that due process prevents the prosecution from commenting at trial on a criminal defendant's silence in response to the Miranda warnings, but that due process does not prohibit the prosecution from impeaching a defendant's trial testimony by referring to the defendant's pre-arrest, or post-arrest, but pre-Miranda, silence.

In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Supreme Court held that the Due Process Clause ordinarily prohibits the use of a defendant's post-*Miranda* silence to impeach his trial testimony.[4] The

[4] Due process also generally prohibits the use of a defendant's post-*Miranda* silence as substantive evidence of guilt. *See United States v. Moreno*, 185 F.3d 465, 473 (5th Cir.1999). The general rule of *Doyle* is not absolute, however. For example, the prosecution can use a defendant's post-*Miranda* silence to rebut testimony by the defendant

enduring rationale of *Doyle* is that, because the *Miranda* warnings carry with them an implicit assurance by the government that it will not use the defendant's exercise of the right to remain silent against him, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle*, 426 U.S. at 618, 96 S. Ct. 2240.[5] Consistent with *Doyle*'s emphasis on fairness, the Supreme Court held in two later cases that it does not violate due process for the prosecution to impeach a defendant's testimony by reference to the defendant's pre-arrest, or post-arrest, but pre-*Miranda*, silence. *See Fletcher v. Weir*, 455 U.S. 603, 604-07, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982) (post-arrest, pre-*Miranda* silence); *Jenkins v. Anderson*, 447 U.S. 231, 239-40, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (pre-arrest silence). In *Jenkins*, the Court explained that "the fundamental unfairness present in *Doyle*" does not exist with respect to the use of pre-arrest silence on cross-examination because "no governmental action induce[s] [a defendant] to remain silent before arrest." 447 U.S. at 240, 100 S. Ct. 2124. The *Fletcher* court subsequently rejected the argument that the fact of arrest was sufficient to trigger *Doyle*'s fundamental fairness concern: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it

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that he cooperated with the police at the time of his arrest. *See United States v. Rodriguez*, 260 F.3d 416, 421 (5th Cir. 2001).

[5] The *Doyle* court also noted that such silence is not necessarily probative because it is "insolubly ambiguous." *Doyle*, 426 U.S. at 617, 96 S. Ct. 2240. But subsequent decisions have made clear that the "fundamental fairness" rationale was the key feature of *Doyle*. *E.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (noting that *Doyle* rests on fundamental fairness and finding that pre-*Miranda* silence "is probative"); see also *Rodriguez*, 260 F.3d at 421 n. 1 (stating that *Doyle*'s "'insolubly ambiguous' rationale has since been discarded").

violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." 455 U.S. at 607, 102 S. Ct. 1309; see also *United States v. Musquiz*, 45 F.3d 927, 930-31 (5th Cir. 1995) (permitting use of pre-*Miranda* silence to cross-examine defendant).

Although *Fletcher* clearly permits the use of a defendant's pre-*Miranda* silence to impeach the defendant's trial testimony, the Supreme Court has not specifically decided whether the prosecution violates *Doyle* by commenting on the defendant's pre-*Miranda* silence when the defendant does not testify in his own defense. Given *Fletcher*'s emphasis on the affirmative assurances of the *Miranda* warnings, however, it is clear that, irrespective of whether the defendant testifies at trial, the rationale of *Doyle* applies only to post-*Miranda* silence. *See Wainwright v. Greenfield*, 474 U.S. 284, 291 n. 6, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986) (noting that "fundamental unfairness" referred to in *Doyle* and its progeny "derives from the implicit assurances of the *Miranda* warnings"); *Combs v. Coyle*, 205 F.3d 269, 280 (6th Cir. 2000) ("[T]he *Doyle* line of cases clearly rests on the theory that *Miranda* warnings themselves carry an implicit assurance that silence will not be penalized; actual receipt of the warnings is key. Therefore, the comment on Combs's pre-*Miranda* silence did not violate due process."). Accordingly, because Salinas was not read the *Miranda* warnings after he was arrested in this case, the prosecutor's comments did not violate *Doyle*.

B. The Privilege Against Self-Incrimination

Salinas also argues that the prosecution's references to his post-arrest silence violated the Fifth Amendment

privilege against self-incrimination.[6] No published decision of this court has addressed whether the prosecution can, at trial, introduce substantive evidence that the defendant remained silent after he was arrested and taken into custody, but before he was given the *Miranda* warnings. This court has previously held that a prosecutor's reference to a non-testifying defendant's *pre-arrest* silence does not violate the privilege against self-incrimination if the defendant's silence is not induced by, or a response to, the actions of a government agent. *See United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996).[7] Moreover, one unpublished decision of this court has interpreted *Zanabria* to permit the substantive use of post-arrest, pre-*Miranda* silence. *See*

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[6] Although the *Doyle* line of cases focused primarily on due process, in each of those cases, the prosecution used the defendant's silence only to impeach the defendant's trial testimony, so the privilege against self-incrimination was inapplicable. *See Jenkins*, 447 U.S. at 237-38, 100 S. Ct. 2124 (rejecting argument that use of pre-arrest silence for impeachment violated privilege against self-incrimination because "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial"). As noted above, Salinas did not testify at trial.

[7] We do not read *Zanabria* as categorically holding that the prosecution's use of a defendant's pre-arrest silence as substantive evidence can never violate a defendant's constitutional rights. Indeed, the *Zanabria* court assumed, without deciding, that pre-arrest silence could be protected by the Fifth Amendment:

> Assuming without deciding that Zanabria's pre-arrest silence falls within the reach of "testimonial communications" protected by the fifth amendment, the record makes manifest that the silence at issue was neither induced by nor a response to any action by a government agent. The fifth amendment protects against compelled self-incrimination but does not, as Zanabria suggests, preclude the proper evidentiary use and prosecutorial comment about every communication or *lack* thereof by the defendant which may give rise to an incriminating inference. We find no error in the use of this evidence or in the prosecutor's comments thereon.

74 F.3d at 592.

United States v. Garcia-Gil, 133 Fed. Appx. 102, 108 (5th Cir. 2005) (stating that *Zanabria* "prevents *Garcia-Gil* from drawing a distinction based on whether the silence was used as impeachment evidence or as substantive evidence of guilt").[8]

In addition, there is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. The Seventh, Ninth, and D.C. Circuits have all squarely held that it does. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-30 (9th Cir. 2001) (en banc); *United States v. Whitehead*, 200 F.3d 634, 637-39 (9th Cir. 2000); *United States v. Moore*, 104 F.3d 377, 384-90 (D.C. Cir. 1997); *United States v. Hernandez*, 948 F.2d 316, 322-23 (7th Cir. 1991).[9] The First and Sixth Circuits have gone further and have held that the substantive use of even pre-arrest silence can violate the privilege against self-incrimination. *See Combs*, 205 F.3d at 280-83; *Coppola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir. 1989). The Fourth, Eighth, and Eleventh Circuits have, on the other hand, found the substantive use of post-arrest, pre-*Miranda* silence during the prosecution's case-in-chief permissible. *See United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985).

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[8] Although we do not today decide this constitutional issue, we expressly decline to endorse the reasoning of the non-precedential opinion in *Garcia-Gil*, which appears to have reached a broad holding on the use of post-arrest silence by simply extrapolating from *Zanabria*'s narrow holding on the use of pre-arrest silence on specific facts.

[9] The Second Circuit has assumed, without deciding, that such use of a defendant's pre-*Miranda* silence is impermissible. *See United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981).

We need not decide this constitutional question today. Because this circuit's law remains unsettled and the other federal circuits have reached divergent conclusions on this issue, even assuming that the prosecutor's comments were improper, Salinas cannot satisfy the second prong of the plain error test — that the error be clear under existing law. *See United States v. Bennett*, 469 F.3d 46, 50 (1st Cir. 2006) ("In light of conflicting case law, any error that might have been committed by the district court was not 'obvious,' and therefore not plain error."); *United States v. Thompson*, 82 F.3d 849, 856 (9th Cir. 1996) ("Because of the circuit split, the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue, we cannot brand the court's failure to exclude the evidence 'plain error.'") (internal footnote omitted). Accordingly, Salinas cannot establish plain error, and he is therefore not entitled to relief on this claim.

III. Sufficiency of the Evidence

Salinas's remaining argument is that the evidence at trial was insufficient to establish that he knowingly possessed the firearms that were found in the Yukon. Where, as in this case, the defendant moves for a judgment of acquittal at the close of the government's case, but fails to renew the motion at the close of all evidence, the court applies a stricter standard to a sufficiency of the evidence challenge. United States v. Green, 293 F.3d 886, 895 (5th Cir.2002); United States v. Ruiz, 860 F.2d 615, 617 (5th Cir.1988). In such cases, the court reviews the evidence only to determine whether there has been a manifest miscarriage of justice, which occurs only when the record is devoid of evidence of guilt. Green, 293 F.3d at 895; Ruiz, 860 F.2d at 617.

To convict Salinas, the government had to prove (1) that Salinas had a prior felony conviction; (2) that he possessed a

firearm; and (3) that the firearm traveled in or affected interstate commerce. *See United States v. Guidry*, 406 F.3d 314, 318 (5th Cir. 2005). The court correctly charged the jury that possession could be actual or constructive. Constructive possession can be established by showing (1) ownership, dominion or control over an item; or (2) dominion or control over the place where the item is found. *See United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999). Possession may be proved by circumstantial evidence. *Id.* Where there is joint occupancy or control, however, the government must, in addition to showing control over the place where the item was found, present evidence to support at least a plausible inference that the defendant knew of the item itself. *See id.* at 497.

Salinas argues that the record is devoid of evidence that he knew that the firearms were in the Yukon. As the government asserts, however, there was evidence in the record to support an inference that Salinas possessed the firearms and knew that they were in the Yukon. Contrary to his defense at trial, Salinas initially claimed that he was in the process of purchasing the Yukon, and one of the firearms was found within reach of the driver's seat, where Salinas was sitting. Moreover, two days after his arrest, Salinas attempted to claim property — specifically, his "money and other stuff"[10] — from the Yukon at the police station's property room. This evidence together was easily sufficient for a jury to conclude that the government satisfied its burden of proof. In addition, the prosecution introduced substantial evidence to rebut Salinas's proffered defense at trial. Accordingly, we find that there was sufficient evidence to support Salinas's conviction.

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[10] In this regard, it is significant that one of the weapons was found between the driver's seat and the center console, underneath a paper bag containing $3,397 in cash.

CONCLUSION

For the reasons stated above, we AFFIRM Salinas's conviction.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-10964

U.S. COURT OF APPEALS
FILED

APR 09 2007

CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARIO ALFREDO SALINAS

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 3/5/07, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, DENNIS AND OWEN, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/_____
James L. Dennis
United States Circuit Judge

REHG-6a

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX C

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.